

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANTHONY T. LeCLAIRE and U.S. POSTAL SERVICE,
POST OFFICE, City of Industry, CA

*Docket No. 00-841; Submitted on the Record;
Issued April 30, 2001*

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's benefits effective March 2, 1997 on the grounds that residuals of his work-related condition had ceased on or before that date.

On April 13, 1997 appellant, then a 40-year-old retired letter carrier, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that his right shoulder condition was causally related to his federal employment. The evidence reflects that appellant worked as a letter carrier from February 1978 through December 16, 1996, when he stopped work and subsequently retired on medical disability. The Office accepted the claim for work-related right shoulder impingement, right partial rotator cuff tear and a November 30, 1996 right shoulder arthroscopy.

In an October 19, 1997 medical report, appellant's treating physician, Dr. Kenneth W. Kengla, a Board-certified orthopedic surgeon, stated that appellant continued to have symptomatology about his shoulder, which would not be expected to improve significantly from its present levels. Dr. Kengla stated that appellant was unable to take part in any work activities involving the use of his right upper extremity at or above the shoulder level, do any significant pushing or pulling activities, or any moderate to heavy lifting and carrying activities. He opined that appellant's resulting disability was present on a permanent basis and would gradually increase over the future due to natural progression.

The Office referred appellant to Dr. Thomas R. Dorsey, a Board-certified orthopedic surgeon, for a second opinion on whether appellant continued to have any disability causally related to his accepted employment injury. In a report dated November 24, 1997, Dr. Dorsey opined, based upon appellant's employment injury and medical history, a review of the medical records, statement of accepted facts and physical examination, that the objective evidence indicated that appellant did not have any continuing disability from his accepted employment injury. He stated that, with regard to the right shoulder impingement syndrome, the basis

pathophysiology of his shoulder symptom would likely have occurred regardless of appellant's employment. Dr. Dorsey stated, however, that the description in the statement of accepted facts with regard to the casing activities, letter carrying activities and delivery activities would, in fact, accelerate his shoulder impingement syndrome. He opined that this would have been a temporary aggravation. Dr. Dorsey noted that, subjectively, appellant has "flaring, popping and inflammation of the right shoulder" on overhead activities. However, objectively, appellant has excellent range of motion of the right shoulder, with no evidence of instability and no evidence of significant pain on range of motion. He stated that appellant's disability to his right shoulder impingement and partial rotator cuff tear would have ceased within two months after his December 30, 1996 arthroscopic surgery. Therefore, appellant was disabled from December 6, 1996 up to March 2, 1997. Dr. Dorsey further related that appellant's work-related acceleration of the impingement syndrome had resolved and would have resolved within two months after the surgery for his shoulder, which also would have been March 2, 1997. He further related that appellant could return to the duties he was performing before he stopped work on December 6, 1996. An OWCP-5c form was completed limiting appellant's activities.

In a December 17, 1997 letter, the Office issued a notice of proposed termination of compensation and advised appellant that he had 30 days in which to respond.

By decision dated January 22, 1998, the Office issued a decision terminating appellant's medical benefits based upon Dr. Dorsey's opinion that appellant no longer suffered from residuals of his accepted employment injury as of March 2, 1997.

In a letter dated September 29, 1998, appellant's representative requested reconsideration of the termination of his benefits.

In a February 2, 1998 report, Dr. Kengla noted that appellant's condition was considered permanent and stationary. On examination, it was noted that appellant complained of pain in the right shoulder with overhead work or reaching and heavy lifting and a loss of strength in the right upper extremity is felt in comparison to the left. Physical examination findings included tenderness of the right trapezii, supraspinatus, infraspinatus, acromioclavicular joints, biceps tendon grooves and subacromial space and 10 degree decrease from the normal in the right shoulder range of motion with abduction and external rotation. He opined that appellant had permanent disability precluding heavy lifting, pushing and pulling and any repetitive work at or above shoulder level.

In an August 28, 1998 report, Dr. Kengla noted that appellant was unchanged symptomatically from the time of his previous visit of February 2, 1998. It was noted that appellant continued to have pain in his right shoulder accompanied by crepitus with any attempt at work activities at or above shoulder level as well as any heavy lifting or carrying activities. He noted that appellant was limited to lifting only 10 to 15 pounds with the right upper extremity. Dr. Kengla opined that appellant continued to be unable to take part in the usual and customary duties of a letter carrier-type position.

By merit decision dated May 10, 1999, the Office denied appellant's request for reconsideration on the basis that the evidence submitted was insufficient to warrant modification of the prior decision.

In a March 25, 1999 progress report, which the Office received on May 13, 1999, Dr. Kengla stated that appellant exhibits functional range of motion, but has pain upon extremes of motion. Appellant also has pain within sustained work at or above shoulder level. He stated that there were multiple trigger points in the periscapular area as well as in the trapezii.

By letter dated August 23, 1999, appellant's representative again requested reconsideration. Submitted with the request was a June 23, 1999 report from Dr. Kengla. He agreed that appellant has exhibited full functional range of motion during his postoperative period which continues at this time. Dr. Kengla further agreed with the claims examiner that "motion testing is subject to patient participation and is, therefore, not truly objective in nature." He noted, however, that the Office continued to dismiss the ongoing symptoms appellant is experiencing postoperatively due to their "subjective nature." Dr. Kengla stated that appellant continued to experience significant discomfort on the extremes of motion as well as any activities involving the use of his hand/arms at or above shoulder level except for the shortest periods of time. He specifically stated that appellant experienced pain on the extremes of motion when the motions were performed passively by him. Dr. Kengla opined that any activities requiring appellant to utilize his upper extremity for repetitive motions, such as casing mail at or above shoulder level, continually reaching back to operate the seat belt harness while driving the mail trucks, continually opening and closing the sliding door on the mail truck, or lifting any weight in excess of 10 pounds, would definitely be contraindicated in appellant's particular case due to the repetitive and weighted stress to his right shoulder region. He also stated that, in regards to Dr. Dorsey's comment that appellant "should have been ready to work at his usual and customary duties as a mail carrier eight weeks postoperatively," there was a wide range of rehabilitation times postoperatively with individual patients and activities such as being a mail carrier would not be well tolerated at just eight weeks postoperatively for the average patient. Dr. Kengla continued to opine that appellant was suffering from residual problems secondary to his accepted right shoulder condition. He stated that, while appellant exhibits a satisfactory range of motion, there is definite pain upon extremes of motion as seen both in passive and active range of motion testing. Dr. Kengla also related that the May 10, 1999 examination revealed multiple trigger points in the parascapular area as well as the trapezii which were also the result of his ongoing shoulder problems and inflammation.

The Office referred the case to an Office medical adviser asking what are trigger points and whether that finding was dependent on the patient's cooperation or was it something a physician considers to be independent of the patient's cooperation/noncooperation. In a September 16, 1999 response, the Office medical adviser stated that trigger points were areas of muscle spasm (usually small) which are tender to pressure and, therefore, the patient's cooperation and subjective response is part of the diagnosis.

By merit decision dated November 3, 1999, the Office denied appellant's request for reconsideration on the basis that the evidence submitted was insufficient to warrant modification of the prior decision. The Office advised appellant that, as his attending physician implicated new factors of employment following appellant's surgery, appellant may wish to file a new claim for occupational disease and provided the necessary information on which to do so.

The Board finds that the Office failed to meet its burden of proof in terminating appellant's compensation benefits effective March 2, 1997.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.¹ After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.² The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.³

In this case, the Office accepted that appellant sustained a work-related right shoulder impingement and right partial rotator cuff tear. Appellant underwent a right shoulder arthroscopy on November 30, 1996. To justify terminating appellant's compensation, the Office relied on the November 24, 1997 report of Dr. Dorsey, a Board-certified orthopedic surgeon, who performed a second opinion evaluation. In his report, Dr. Dorsey opined that appellant's disability would have ceased within two months after his December 30, 1996 arthroscopic surgery, that appellant was disabled from December 6, 1996 to March 2, 1997 and that appellant could return to his regular duties before he stopped work on December 6, 1996. The Board finds, however, that the October 19, 1997 report of Dr. Kengla, appellant's treating physician and also a Board-certified orthopedic surgeon, creates a conflict of medical opinion with that of Dr. Dorsey with regard to whether appellant's disability ceased after the November 30, 1996 arthroscopic surgery and whether appellant is capable of returning to his regular duties. In his October 19, 1997 medical report, Dr. Kengla reported that appellant was unable to take part in any work activities involving the use of his right upper extremity at or above shoulder level, do any significant pushing or pulling activities and that the resultant disability was present on a permanent basis and would gradually increase over the future due to natural progression. It is noted that Dr. Dorsey saw appellant for the first time approximately one month after Dr. Kengla reported significant residuals and that appellant's employment-related activities were extremely limited on October 19, 1997. Furthermore, Dr. Dorsey concluded that appellant's disability would have ceased within two months after his December 30, 1996 arthroscopic surgery, which was seven months prior to his examination of appellant. Section 8123(a) of the Federal Employees' Compensation Act provides in part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."⁴ In view of the discrepancies between the opinions of Drs. Kengla and Dorsey and the fact that the Office terminated compensation benefits retroactively to a period seven months prior to Dr. Dorsey's examination of appellant, the Board finds that there is a conflict of opinion in the medical evidence as to whether appellant is suffering from residuals of an employment-related condition. Accordingly,

¹ *Lawrence D. Price*, 47 ECAB 120 (1995).

² *Id.*; see *Patricia A. Keller*, 45 ECAB 278 (1993).

³ See *Mary Lou Barragy*, 46 ECAB 781 (1995); see also *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁴ 5 U.S.C. § 8123(a).

the Board finds that the Office improperly terminated appellant's compensation benefits effective March 2, 1997.

The November 3 and May 10, 1999 decisions of the Office of Workers' Compensation Programs are reversed.

Dated, Washington, DC
April 30, 2001

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member